

GILBERT T. GONSALVES,)
)
 Plaintiff)
)
 v.) *Civil No. 90-0247 P*
)
 INTERNAL REVENUE SERVICE,)
)
 Defendant)

¹ The plaintiff improperly named the Internal Revenue Service as the defendant.

The skeletal complaint filed by plaintiff Gilbert T. Gonsalves neither asserts its jurisdictional ground nor demonstrates any entitlement to relief. Gonsalves reminds the court of his limitations in filing *pro se*. The Plaintiff's Objection to the Motion to Dismiss ("Plaintiff's Objection") at 1. As a *pro se* litigant, Gonsalves is "entitled to have his pleadings liberally construed." *Gilday v. Boone*, 657 F.2d 1, 2 (1st Cir. 1981) (citations omitted). Even so, "[c]ourts need not . . . conjure up facts that are not pleaded to support conclusory allegations of the complaint." *Luce v. Hayden*, 598 F. Supp. 1101, 1102 (D. Me. 1984) (citation omitted).

A. Failure to Plead Jurisdiction

The doctrine of sovereign immunity bars suit against the United States without its consent. *United States v. Mitchell*, 463 U.S. 206, 212 (1983); 5 C. Wright & A. Miller, *Federal Practice and Procedure* ' 1212 at 126 (1990) ("Wright & Miller"). The United States "consents" to suit through statutes that expressly or impliedly waive its immunity. 5 Wright & Miller ' 1212 at 126. A litigant suing the United States must indicate which statutes accord him the right to press his case and the court the authority to decide it. *Id.* at 126-27. In derogation of Fed. R. Civ. P. 8(a)(1), the plaintiff's complaint fails to allege any such statutory right. Nonetheless, because Gonsalves appears *pro se*, I have conducted independent statutory research and reviewed the pleadings to determine whether any statutory basis for jurisdiction may be inferred.

At least two statutes conceivably waive sovereign immunity in the instant case. The plaintiff alleges both that the Internal Revenue Service ("IRS") failed to follow its own regulations, Plaintiff's Objection at 2; Complaint & 1, 3, and otherwise wronged him in attaching his wages, Complaint && 2-6. The first possible statutory basis for jurisdiction, 26 U.S.C. ' 7433, confers an exclusive remedy for civil damages resulting from the reckless or intentional disregard of taxpayer rights conferred by IRS

statutes or regulations. A plaintiff basing a claim on ' 7433 must exhaust his administrative remedies and file suit ``only within 2 years after the date the right of action accrues." 26 U.S.C. ' 7433(d)(3). The second possible basis for jurisdiction, 26 U.S.C. ' 7422, permits suit in federal district court to recover refunds wrongfully denied. A ' 7422 plaintiff first must exhaust his administrative remedies by filing a refund claim with the IRS. 26 U.S.C. ' 7422(a). Such refund claims must be filed ``within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later" 26 U.S.C. ' 6511(a).

In an attempt to preserve his lawsuit, Gonsalves provides a copy of a letter he received from the IRS. Exhibit to Plaintiff's Objection. In this correspondence, dated January 22, 1990, the IRS informs the plaintiff that he may sue in United States District Court to appeal its denial of his tax claim within two years from the date of the letter. *Id.* The letter apparently refers to the two-year statute of limitations in ' 7433.

I would be willing to give this plaintiff the benefit of the doubt, and infer ' 7433 and/or ' 7422 as his statutory bases for jurisdiction, were it not for a factual conflict on the face of his own materials. The complaint itself is devoid of any reference to dates. Elsewhere, Gonsalves states that ``[t]he tax year in question was 1981 . . . the only year in which a levy was involved" Plaintiff's Objection at 1. The IRS letter appears to involve a different tax dispute, covering the 1984 and 1985 tax years. *See* Exhibit to Plaintiff's Objection. Even a *pro se* plaintiff must plead the facts from which a jurisdictional basis may be inferred. *See, e.g., Fagone v. Fagone*, 648 F. Supp. 488, 489 n.1 (D. Me. 1986). This the plaintiff has failed to do. The court is left clueless as to whether, for purposes of ' 7433, the plaintiff exhausted his administrative remedies and filed the instant suit within the two-year statute of limitations

period.² The court also lacks evidence as to whether, for purposes of ' 7422, Gonsalves timely filed a claim for a tax refund for the 1981 levy. These facts are not mere technicalities; without, them the court lacks jurisdiction to decide this case.

B. Failure to Plead Claim

Fed. R. Civ. P. 8(a)(2) does not ``require a claimant to set out in detail the facts upon which he bases his claim." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). It does, however, mandate that the claimant ``give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Id.* Fair notice contemplates ``a statement of circumstances, occurrences, and events in support of the claim being presented," rather than ``a bare averment" that the claimant wants and is entitled to relief. 5 Wright & Miller ' 1215 at 145. ``While a plaintiff need not plead evidence, he must state facts which, if proven, would entitle him to relief." *Sandler v. Eastern Airlines, Inc.*, 649 F.2d 19, 20 (1st Cir. 1981).

The plaintiff's pleadings present few facts from which to discern any entitlement to relief. The IRS attached the plaintiff's wages to satisfy a tax owing for the 1981 tax year. Complaint & 6; Plaintiff's Objection at 1. The plaintiff alleges that the IRS, *inter alia*, ``used delaying and evasive" tactics to deny the plaintiff his right of appeal, Complaint & 1, ignored the issue of retroactive taxation, *id.* & 2, and seized funds without due process of law, *id.* & 3. The defendant allegedly intentionally disregarded ``all" of the rights listed in IRS Publication No. 1 (8-88). Plaintiff's Objection at 2. The

² The plaintiff observes that his ``problems with the Defendant has [sic] extended over a five year period." Plaintiff's Objection at 2. This raises a serious question whether the plaintiff has run afoul of the statute of limitations found in ' 7433.

pleadings are conclusory and nearly devoid of any supporting ``circumstances, occurrences, and events." They fail to put the defendant, or the court, on notice of what concrete actions allegedly violated the plaintiff's rights. Indeed, they constitute ``bare averments" that the plaintiff is entitled to relief.

The command that a court construe pleadings ``as to do substantial justice," Fed. R. Civ. P. 8(f), does not trump the defendant's right ``to know the nature and extent of the claim" *Campana v. Eller*, 755 F.2d 212, 215 (1st Cir. 1985).

II. CONCLUSION

For the foregoing reasons, I recommend that this court *DISMISS* the instant complaint for failure to meet the pleading requirements of Fed. R. Civ. P. 8(a)(1) and (2).

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 4th day of February, 1991.

*David M. Cohen
United States Magistrate Judge*